In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4023

JOSEPH FREDERICKS and CLARENCE CHAMBERS, *Plaintiffs in Error*

vs.

UNITED STATES OF AMERICA, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE

The plaintiffs in error, Joseph Fredericks and Clarence Chambers, were indicted on four counts. The first count charging a conspiracy between themselves and other persons to the grand jurors unknown, to violate the act of October 28, 1919, and

the purpose of the conspiracy was alleged to be the importing, possessing and transporting of intoxicating liquors. But one overt act was alleged and that was that the plaintiffs in error, "from a foreign country, to-wit, British Columbia, in the Dominion of Canada, on or about the 4th day of October, 1922, did wilfully, knowingly and unlawfully carry, and transport in and on a certain gas boat known as the 'Dragon,' to a place near Stanwood, Washington, ... certain intoxicating liquors." The second count alleged the importation of the same intoxicants on the same day, from the same foreign country. The third count charged the possession of the same intoxicants on the same day, and the fourth, the transportation of the same intoxicants on the same day in the same boat. (Trans. p. 2.)

A motion to quash the indictment and for a return of the evidence (Trans. p. 9) and also a demurrer (Trans. p. 13) having been overruled, the defendants pleaded not guilty (Trans. p. 16) and were placed on trial. (Trans. p. 17.) At the conclusion of the trial, the jury returned a verdict of guilty as charged on Counts I, III and IV of the indictment as to the plaintiffs in error (Trans. p. 20), and after a motion for a new trial and motion

in arrest of judgment had been duly interposed and denied (Trans. p. 177), plaintiffs in error were each sentenced to serve a term of eighteen months in the federal penitentiary at McNeil's Island on the first count and to pay a fine of Fifty Dollars ($50.00) each on each of the other two counts. (Trans. pp. 34, 35.)

Whereupon application was made for a writ of error to review the judgment of the District Court, which having been granted, the case was brought to this court.

The indictment was filed October 26, 1922. Against this indictment, on the first day of November, 1922, the plaintiffs in error, after demand for return of the liquor seized, filed a motion for the suppression of the evidence obtained, as seized in violation of their constitutional rights. (Trans. pp. 9-12.)

This motion was heard on affidavits. The evidence of the plaintiffs in error tended to show that on the evening of October 4, 1922, at about 6:15 in the evening while they were on board of the gas boat "Dragon," going up the south channel of the Stillaguamish River, near Stanwood, Washington, five men suddenly rose up from behind a dike and

leveled rifles and sawed-off shotguts at them, crying out: "We know who you are. Stop or we'll kill you." That the plaintiffs in error, not knowing who the men were, but believing them to be hold-up men, stopped the boat and Chambers, who was in the pilot house, stepped back into the cabin, whereupon the men on the bank fired a volley into the boat, striking Chambers in the leg and seriously wounding him. That among other things on the boat, there was a quantity of whiskey and gin contained in gunny sacks in the cabin of the boat, the cargo of the boat being entirely concealed by the cabin, and curtains on the windows. That after shooting Chambers, the men on the bank, who later proved to be prohibition agents, came upon the boat and without exhibiting or stating that they had any search warrant, proceeded to search the boat and on discovering the liquor, placed the plaintiffs in error under arrest and seized the boat. (Trans. pp. 60-69.) In addition to their own affidavits, the plaintiffs in error submitted the affidavits of George G. Myron, Martin N. Leque and Eric Sederstrom, three farmers who were working in a near-by field, whose affidavits substantiated the version of the plaintiffs in error. (Trans. pp. 98, 101, 102.) The government filed affidavits of the agents, who

took part in the arrest, to the effect that they had information that this boat was used for transporting liquor and that an agent by the name of Regan had on the 27th day of September procured a search warrant. No copy of the search warrant was ever produced in court but the application and affidavit therefor was produced, which was as follows:

"United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT

L. Regan, being first duly sworn, on his oath deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress has been and is being committed in this, that, in the City of Stanwood, County of Snohomish, State of Washington, and within the said District and Division above named, one John Doe Foster, on one gas screw-boat named "Dragon" on the 27th day of September, 1922, and thereafter was, has been and is possessing, transporting intoxicating liquor, all for beverage purposes, on premises described as ——, and on the premises, used, operated and

occupied in connection therewith, all being in the County of Snohomish, State of Washington, and in said District, and all of said premises being occupied or under the control of John Doe Foster, all in violation of the statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, this said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said district and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said gas screw-boat named "Dragon," and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor *and* means of committing the crime aforesaid all as provided by law and said Act.

(Signed) L. REGAN.

Subscribed and sworn to before me this 27th day of September, 1922.

[Seal] (Signed) R. W. MCCLELLAND.
United States Commissioner, ——— District of Washington." (Trans. pp. 66, 89.)

No evidence was presented as to what the information was upon which the prohibition officers applied for the search-warrant.

The evidence of the government tended to show that the agents had lain in wait for this boat some days near Stanwood, Washington, and their affidavits contradicted the affidavits filed by the plaintiffs in error in that they claimed that the curtains were not down on the windows and that when the boat got within twenty or thirty feet of them, they could see piled up in the boat, sacks with the form of bottles discernable through the burlap, which from their experience as prohibition agents, they knew were similar to sacks in which bottles of liquor were transported.

Agent Linville who was in charge of the party of agents making the search and seizure, testified at the preliminary hearing that he did not exhibit or mention the search warrant to the plaintiffs in error but left it in the boat after their arrest and after they had left the boat. (Trans. pp. 74, 75 76.) This statement was later contradicted by affidavits filed before the hearing, on the motion to suppress in which it was claimed by agents Linville and Justi, that agent Linville at the time of

the arrest approached the boat with a pistol in one hand and the search-warrant in the other. The government also filed affidavits by certain residents of Stanwood as to the conditions on the boat some hours after the arrest while it was at the dock at Stanwood, that the curtains on some of the windows at that time were up.

In addition to the affidavits, the plaintiffs in error filed a certified transcript of the testimony of Agent Linville given at the preliminary hearing before the United States Commissioner a few days after the arrest. (Trans. p. 70.)

The motion was submitted on the foregoing record, after argument, to the trial judge, who took the same under advisement, who thereafter filed an opinion in which he held that it was not necessary to discuss the sufficiency of the basis for the issuing of the search-warrant or the legality of its execution, but held that the fact that the agents saw the gunny sacks showing the form of bottles therein warranted them in arresting the defendants. (Trans. p. 113.)

The plaintiffs in error then demurred to the indictment among other things on the grounds of improper joinder and that the same was duplicitous

and uncertain. (Trans. p. 13.) The trial court overruled this demurrer. (Trans. p. 117.)

In impanelling the jury, counsel for plaintiffs in error were required to ask their general questions as to the qualifications of the jurors to the jury en masse and not to repeat the same to each individual juror. To this action of the court, the plaintiffs in error excepted and their exception was allowed. (Trans. p. 120.) The trial court also refused them the right to ask the jurors if they would vote for no verdict except that which each thought to be right. (Trans. p. 119.)

The evidence of the government at the trial tended to establish that certain agents of the government had gone to Stanwood the latter part of September, 1922, with a view to investigating the reported illicit use of the gas boat "Dragon" in transporting liquor; that on the afternoon of Sunday, October 1st, they had seen the boat leave Stanwood, going out the north fork of the Stillaguamish River. At about noon, on the 4th of October, they saw it again, anchored in mud bay at the mouth of the south fork of the river and watched it until it left in the afternoon and started up the south fork, where the boat was stopped, the plaintiffs in error

arrested and liquor on board seized under the circumstances heretofore detailed.

In addition to the testimony of the agents as to the arrest, a resident near the scene of the seizure testified to having seen the defendant Chambers on the boat "Dragon" in the month of September (Trans. p. 137), and another resident testified to having seen both of the defendants on the boat during the month of September. (Trans. p. 138.) A. W. Johnson, a clerk in the federal prohibition office, testified that about noon on the day following the arrest, he heard a conversation between defendant Chambers and federal prohibition agent Regan at the hospital to which the defendant Chambers was taken. He testified that Chambers first stated that he had an interest with Fredericks in the boat but later stated that he was employed as an engineer on the boat, and that the liquor was gotten from Pender Island in Canadian waters. (Trans. p. 140.) This alleged admission was claimed to have been made when the defendant Fredericks was not present. Leonard Regan, a prohibition agent, was also a witness and testified to substantially the same state of facts as Johnson. (Trans. p. 141.)

There was no testimony on the part of any of the witnesses for the government (outside of the purported confession of Chambers that the liquor was secured on Pender Island) that the liquor found on the "Dragon" had been brought from Canada as alleged in the only overt act in the conspiracy count of the indictment.

At the conclusion of the government's case, the defendants moved for a directed verdict of not guilty under the conspiracy count, upon the ground that no competent evidence had been introduced, which tended to establish the overt act laid in the indictment. The defendant Fredericks further moved for a directed verdict of not guilty under the conspiracy count on the ground that if the court should hold that the statement made by Chambers as to the liquor being brought from British Columbia was competent to establish the overt act, as against Chambers, it could not establish the overt act as against Fredericks, said statement being made in the absence of Fredericks and after the termination of the alleged conspiracy. Both of the defendants also moved for a directed verdict in their own behalf upon Count II of the indictment wherein they are charged with importing liquor from British Columbia upon the ground that without other evi-

dence of the corpus delicti, i. e., the importation other than the finding of the liquor, the alleged confession of Chambers was insufficient to bind him and could in no event bind Fredericks because made in his absence. Defendant Fredericks also moved separately for a directed verdict in his behalf upon Count II of the indictment wherein he was charged with importing liquor from a foreign country upon the ground that the evidence was not sufficient to bind him and there was a total failure of proof thereof. These motions were denied, with leave to raise them again at the conclusion of all the testimony. (Trans. pp. 144, 145.) The defendants then offered testimony in their own behalf.

Joseph Fredericks testified that he was thirty-nine years of age, was a farmer and had an interest with Chambers in Lummi Bay Packing Company. That they jointly owned the launch "Dragon" and used it to go back and forth to the cannery of the company. That the "Dragon" was old and leaky, having been built in 1906 and could not withstand rough water and was only capable of making seven miles an hour. That the duck hunting season opened on October 1, 1922, and he and Chambers had planned to go duck hunting in the "Dragon" that day. That they left Stanwood about

noon on October the first. That they went to the mouth of the north fork of the Skagit River, intending to go through the Swinomish slough. The tide being low, they had to wait until about eleven o'clock that night. While at the north end of the slough, they borrowed a boat from a fisherman, which they tied behind the launch. About midnight they went through the slough and on to a place known as Joe Leary's slough, arriving there about two o'clock in the morning.

They slept on the boat and got up about 7:30 next morning to go duck hunting, when they noticed that their rowboat was gone. They then decided to go back and see if they could find the rowboat. On the way back, they developed trouble with their magneto and were delayed till evening, so they stayed that night at La Conner. They called up a friend by the name of Tjesland, who had a farm near La Conner and asked him to come in and take them in his automobile to La Conner to get a magneto they had at the Palace Hotel there. This Tjesland did. They got the magneto from Cort, the proprietor of the hotel and also borrowed a rifle from him. Leaving Stanwood about midnight, they arrived back at La Conner about one o'clock on the morning of the 3rd of October. About six

o'clock that morning, they got up and went out to Hebloom's fish trap near Skagit Island, where they borrowed a rowboat from a Harry Rock, who was in charge of the trap. They hunted on the bay all day and returned with some ducks they had shot, to the fish trap, where they had supper with Rock on board the "Dragon." Rock stayed with them till about eleven o'clock that night, when Rock went back to his fish traps and the defendants went to sleep on their launch. About half past three next morning, Fredericks was awakened by a man calling and got up to see who it was. The stranger told him that his launch had broken down and asked if he could help him out by taking his cargo to Stanwood. Fredericks agreed to do so. Chambers was asleep in the engine room at the time. After the boat was loaded, the owner got on board and Fredericks started the boat for Stanwood. On the way in they passed the boat "Lily" at the north ford of the Stillaguamish River, the man who owned the cargo got off on the bridge and promised to meet the launch at the dock at Stanwood. On the way up the river, the magneto developed trouble again and while attempting to fix it, the boat drifted out of the south channel, into Mud Bay, where it became lodged on the tide flats and it was six hours before they could get off, at about four

o'clock in the afternoon. On the way up the river, Fredericks was in the back of the boat cooking supper, when he heard hollering and shouting, which he first thought was being done by hunters but later found to be prohibition agents. (Trans. pp. 145-150.)

Chambers testified that he was thirty-one years old, born in La Conner and lived there all his life, except for two years spent as a volunteer in the United States army, during the World War, where he served in the airplane service and was injured therein. He was a farmer. He corroborated the story of Chambers as to their whereabouts from the time they left Stanwood on October 1st to go duck hunting, till their arrest on the 4th. He testified he did not wake up till seven o'clock on the morning of the 4th and knew nothing of the cargo being put on board till the boat was aground in Mud Bay. He denied that he made any statement to Regan and that he did not know where Pender Island was and had never been there. (Trans. pp. 151, 152 and 153.)

Jess Hall, a resident of Stanwood, testified to having seen the defendants in Stanwood at eleven o'clock on the night of October 2nd (Trans. p. 154) as did also Albert Cort, proprietor of the Palace

Hotel. (Trans. p. 154.) Frank Jackson, bridge tender of the Great Northern bridge at the north end of the Swinomish slough testified to seeing the defendants there and that the boat was empty. (Trans. p. 155.) Oscar Tjesland, testified that he was on board the "Dragon" on the night of October 2, 1922, at La Conner and that the boat was empty. (Trans. p. 156.)

Harry Rock, fish-trap foreman, testified to seeing the defendants on October the 3rd at Skagit Bay and to being on the "Dragon" till about eleven o'clock that night, at which time it was empty. (Trans. p. 157.) Captain Henry Whalen of the tugboat "Lily" testified to passing the "Dragon" in the north channel of the Stillaguamish River at six o'clock on the morning of October 4th. (Trans. p. 157.) Samuel Chambers, father of the defendant Clarence Chambers, testified to being present at the hospital when Regan and Johnson were present and denied that his son made any statement that he got the liquor at Pender Island and said that he did no more in the presence of the officers than groan from the pain of his wounded leg. (Trans. p. 158.)

The defendants each severally moved that a verdict of not guilty be returned as to him, or in the al-

ternative that Count I be taken from the jury and a verdict of not guilty be directed, on the ground that there was no evidence to establish the only overt act alleged, the importation from Canada, except the alleged statement of Chambers, which was not sufficient as to Chambers on the ground that the *corpus delicti* can not be proved solely and exclusively by a confession and as to Fredericks for the additional reason that the statement of his co-defendant Chambers after his arrest and in his absence could not be considered as against him. As to Count II each defendant severally moved in the alternative that the court direct a verdict of not guilty, Fredericks for the reason that there was no testimony that connected him with any importation, except the statement made by his co-defendant after his arrest and in his absence, and Chambers for the reason that the *corpus delicti* can not be proved solely and exclusively by a confession. And if the foregoing motions were denied, the defendants moved that the government be required to elect between the conspiracy and the other three counts in the indictment.

Thereupon the court orally ruled as follows:

"THE COURT: I think the motion should be sustained as to Count Two as to each defendant. There is aside from the statement alleged to have been made by the defendant Chambers [133] no testi-

mony before the court that this was imported, and the statement of Chambers can not bind Mr. Fredericks upon the importation; and there is nothing establishing the *corpus delicti* aside from the statement. As I understand the law, there must be some evidence of some kind to establish the *corpus delicti* before the confession could be applied.

"MR. DORE: Would it be proper to ask your Honor what you consider the evidence is as to Count One, so we can make our argument conform?

"THE COURT: Oh, yes, there is testimony as to Count One. The motion is denied as to Count One, the conspiracy charge. Of course, we all understand that at common law a conspiracy or crime was complete upon the act of conspiracy being entered into without any other act; but under the act of Congress,—section 37,—some overt act is necessary to carry into effect or carry forward the conspiracy before it is an offense. Now, that overt act may be any act the most minor. Proof of any sort of an act on the part of a person,—a word would be sufficient, a writing, a movement of any kind. I would say here that while this indictment charges the conspiracy was entered into on the fourth of October, the government is not bound by that date. The conspiracy may have been entered into any time within the period of limitations of three years. There is testimony here as to the activity of the defendants with relation to this vessel prior to this time in the month of September, and likewise in the month of October. The overt acts charged here are that 'After the formation of the conspiracy, said conspirators,' naming them,—'on

or about the 4th day of October did knowingly, unlawfully, carry and transport in [134] and on a certain gas boat known as the "Dragon" to a place in Stanwood.' The charge is that they lived in Stanwood, that the conspiracy was entered into at Stanwood, *and they moved down the river.* Any sort of a movement effectually would be sufficient. So that there is ample testimony here with relation to the overt act, if a conspiracy was entered into, for the purpose of effecting the offense. That is a matter for the jury to determine.

"MR. DORE: We may have an exception, of course.

"MR. MCDONALD: Your Honor holds that the law to be that the overt act need not be proved as laid?

"THE COURT: Oh, no." (Trans. pp. 159-161.)

There was no evidence to prove the only overt act alleged in the conspiracy count, to-wit, the importation of the liquor from Canada. Upon proof of the foregoing facts, the case was sent to the jury and a verdict of guilty returned against the plaintiffs in error on Counts I, III and IV.

The questions in the case are:

1. Was there a violation of the constitutional rights of the plaintiffs in error in the search and seizure of their boat?

2. Was the indictment sufficient?

3. Did the court err in restricting the counsel for plaintiffs in error on their *voir dire* examination of the jury?

4. Was the evidence offered in the case sufficient to warrant submitting the conspiracy count to the jury?

5. Did the court err in the admission and rejection of testimony?

6. Was the jury properly instructed?

ASSIGNMENT OF ERRORS

(Tr. pp. 41-53 incl.)

Come now the above-named defendants, Joseph Fredericks and Clarence Chambers, and in connection with their petition for writ of error in this cause submitted and filed herewith, assign the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which they rely to reverse, set aside and correct the said judgment and sentence entered herein, and say that there is manifest error appear-

ing upon the face of the record, and in the proceedings in this:

I

The District Court erred in overruling the motion of defendants to quash the indictment and for the return and suppression of the evidence of the liquor seized at the time of the defendants' arrest, which motion was made prior to the trial and from the showing made thereon it clearly appeared that the search and seizure was made without the proper issuance or execution of any search warrant or pursuant to any lawful arrest of the defendants and was in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States. Due and timely exception was taken to the action of the trial court in overruling defendants' motion to quash and for the return and [36] suppression of the evidence.

II

The District Court erred in overruling the demurrer to the indictment on the ground that the four counts are improperly joined therein and it is duplicitous and the several counts are not for the same act or transaction nor are they connected to-

gether nor are they of the same class of crimes or offenses.

III

The District Court erred in overruling the demurrer to Count I of the indictment, in this that it does not charge that the defendants were to possess the said liquor for the purpose of sale, barter or exchange, or if they were not to do it by what persons the said acts were to be done and was, therefore, defective for uncertainty.

IV

The District Court erred in overruling defendants' motion for an inspection of the liquor and the right to take samples for analysis prior to the trial.

V

The District Court erred in overruling defendants' motion for a bill of particulars requiring the government to set out a description of the labels and other letters on said liquor.

VI

The District Court erred in overruling the motion of the defendants to require the government to elect

between Count I and Counts II, III and IV as to which the defendants should be tried upon, which motion was made immediately after the case was called for trial and before the introduction of any evidence, upon the ground that Count I charged the defendants together with others as having committed the crime charged in said Count I, [37] whereas the defendants alone are charged with having committed offenses in Counts II, III and IV. Due and timely exception was taken to the action of the trial court in overruling the defendants' motion to elect.

VII

The District Court erred in refusing the defendants' counsel the right to ask the jurors if each of them would vote for only such verdict as to him should seem right irrespective of what the other jurors might think except as the other jurors might influence him by legitimate argument. A juror, Lee J. Priest, being in the box, he was asked by Mr. McDonald this question:

"Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did—

"THE COURT: The question is not fair. Need not answer.

"Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?

"THE COURT: That is not a fair question. What we want to find out is whether the jury knows anything about this case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts.

"MR. MCDONALD: I understand that on the *voir dire* counsel has a right to ask questions—

"THE COURT: No. Proceed. We will not permit any questions upon what jurors will do in the future upon any state of facts being established. [38]

"MR. MCDONALD: Exception.

VIII

The District Court erred in overruling defendants' motion for a return and suppression of the liquors seized at the time of defendants' arrest, when it was renewed at the opening of the government's case and to which due and timely exception was taken.

IX

The District Court erred in admitting in evidence over the objection and exception of the defendants, the bottles of liquor as government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason that said liquor was seized in violation of defendants' constitutional rights.

X

The District Court erred in permitting witness William Griffith to testify that he found two high-power rifles and two mauser pistols with convertible stocks on the launch of the defendants at the time of their arrest and in overruling defendants' objection thereto.

XI

The District Court erred in overruling and in not granting the motions of the defendants for a directed verdict finding them not guilty on Count I, made at the close of the evidence introduced by the government in support of the indictment, which motion was based upon the following several grounds:

(a) Insufficiency of the evidence to establish the overt act in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the overt act charged as against the defendant Fredericks. [39]

XII

The District Court erred in overruling the motions of the defendants for a directed verdict of acquittal on Count I made at the close of the entire case and before it was submitted to the jury, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the overt act charged in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the overt act charged as against the defendant Fredericks.

XIII

The District Court erred in refusing defendants' counsel the right to again go into the facts on the trial as to the manner of the arrest of the defend-

ants and the search and seizure of their launch, which refusal was duly excepted to.

XIV

The District Court erred in overruling and in denying the motion of the defendants that the government be ruled to elect whether it would proceed on Count III or Count IV, as one covers possession and the other transportation and the one is comprised and comprehended in the other.

XV

The District Court erred in refusing to give the jury the following instruction asked for by the defendants:

"If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in said first count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia, in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the 'Dragon' to a

place near Stanwood, Washington, the intoxicating liquors described in [40] said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged can not be found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I."

To the refusal to give which instruction the defendants excepted in due time.

XVI

The District Court erred in refusing to give to the jury the following instruction asked for by the defendants:

"I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat 'Dragon' near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of the law, yet you could not convict either one of these defendants upon either the first or second counts in this indictment, because to convict the defendants on the said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia."

To the refusal to give such instructions, the defendants objected and saved their exception in the presence of the jury.

XVII

The District Court erred in refusing to give the jury the following instruction asked for by the defendants:

"Even though the evidence should convince you that each of the defendants acted illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I."

To the refusal to give which instruction the defendants objected and saved their exception in the presence of the jury.

XVIII

The District Court erred in giving to the jury that portion of the charge of the court given to the jury, which is as follows: [41]

"In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the

conduct of the parties that so inter-relate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the National Prohibition Act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down the stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient that they have proved one act that would carry forward the conspiracy."

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy charged without finding the only overt act, to-wit, the importation charged in the indictment to be proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XIX

The District Court erred in giving to the jury that part of the charge of the court given to the jury, which is as follows:

"The court withdrew,—as I stated a moment ago briefly,—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the National Prohibition Act, to import liquor from British Columbia, and one of the persons then does anything to effect that object—this is simply for the purpose of illustration—if he writes a letter to carry it forward, or if he runs a boat around the bay, if he does anything,—it is immaterial what it is,—to effect the object of the conspiracy, why then the offense is complete without bringing in any of the liquor. But to import any liquor into the United States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that was made before you by counsel for the defendants." [42]

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy

charged without finding the only overt act, to-wit, the importation charged in the indictment to be proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XX

The District Court erred in giving to the jury that part of the charge of the court given to the jury, which is as follows:

"A conspiracy is sometimes denominated by law writers as a partnership in crime. Now, in a civil partnership, one partner binds the other by his acts and his statements with relation to matters within the partnership business. So in a criminal conspiracy, every person entering into a conspiracy is a partner in this conspiracy, and whatever he does or whatever he says during the continuance of the conspiracy binds the other partner; but after the conspiracy is ended or consummated, then the partnership ceases and a party then can not bind the other party by any statements that he may make or anything that he may do."

To which instruction the defendants excepted in due time, because it fails to state that before a person enters into a conspiracy or does an act that con-

tributed to effectuate the object of the conspirators can be guilty, he must have knowledge of the existence of the conspiracy, and that the act that helps in the accomplishment of its object is done knowingly and with the intention of bringing about the accomplishment of the conspiracy.

XXI

Thereafter, and within the time limited by law, and the order and rules of the court, the said defendants and each of them moved for a new trial, which said motion was overruled by the court, and an exception allowed the defendants, which [43] ruling of the court, the defendants now assign as error.

XXII

Thereafter, and within the time limited by law, the defendants moved the court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the court and exception was allowed to the defendants, and now the defendants assign as error the overruling of the said motion.

XXIII

The District Court thereafter entered judgment and sentence against said defendants and each of them upon the verdict of guilty rendered upon the said indictment, to which ruling and judgment and sentence the defendants and each of them excepted and now the defendants assign as error that the court so entered judgment and sentence upon the verdict, because said defendants were convicted on proof taken from them in violation of their constitutional rights and further because said Count I did not state a crime and there was in addition no evidence to support the only overt act alleged therein and judgment upon said Count I as entered was without validity in law. And the trial court further erred in imposing sentence upon Counts III and IV for the reason that the two offenses charged in said counts include and comprehend each other, and the judgment as entered imposed two penalties for one offense, i. e., sentence should have been imposed, if at all, upon one or the other of Counts I or II but not upon both.

And as to each and every of said assignments of error as aforesaid, the defendants say that at the time of the making of the order or ruling of the

court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the court. [44]

WHEREFORE, defendants and each of them pray that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendants from custody and exonerate the sureties on his bail bond or in any event to grant defendants a new trial.

FINAL ISSUES

The above errors may be grouped for the purpose of simplifying the argument into six fundamental questions, which, therefore, become the main issues in the case.

Thus: ERRORS I, IX and X rest upon

ISSUE I

Was there such a violation of the constitutional rights of the plaintiffs in error in the search and seizure of their launch, as to require the suppression of the evidence of the commission of the crime gained thereby?

ERRORS II, III, IV and XIV rest upon

ISSUE II

Was the indictment sufficient?

ERROR VII becomes

ISSUE III

Did the plaintiffs in error have the right to interrogate the jurors separately and to ask if each would only vote for such verdict as he himself thought right?

ERROR XIII becomes

ISSUE IV

Did the court err in its ruling refusing plaintiffs in error to again go into the legality of the search and arrest at the trial?

ERRORS XI and XII rest upon

ISSUE V

Was there sufficient evidence upon which to submit the conspiracy count to the jury or was there a fatal variance between the overt act alleged and the proof?

ERRORS XV, XVI, XVII, XVIII, XIX and XX rest upon

ISSUE VII

Did the court err in instructions given the jury?

ERRORS IV, V and X will not be discussed, and ERRORS XXI and XXII and XIII are merely general objections.

ARGUMENT

At the threshold of this case we are met with a serious question, involving the constitutional rights of the plaintiffs in error. It has been the universal rule in the United States courts to strictly enforce the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, even though it may result in a given case that guilty men go unwhipped of justice, for it has been held that this fundamental law protects them as well as the innocent. This thought has found eloquent expression in the following cases:

Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652.

United States v. Bookbinder, 278 Fed. 216.

United States v. Mitchell, 274 Fed. 128.

United States v. Kelih, 272 Fed. 484.

Atlantic Food Products Corp. v. McClure, 288 Fed. 982.

As a corollary to this, it follows that the success of an unlawful search, does not make the result lawful.

United States v. Slusser, 270 Fed. 818.

State v. One Hudson Automobile, 190 N. Y. S. 481.

With these principles in mind, we shall proceed to discuss the legality of the search, seizure and arrest of the defendants and the use of the evidence so obtained against them.

ISSUE I

The Honorable District Court erred in overruling the motion of plaintiffs in error to quash the indictment and for return or suppression of the evidence, for

Point 1

The issuance of the search warrant was void, because

(1) The affidavit did not state facts showing probable cause.

It is, of course, elementary that under the statute (Sec. 3, Title XI, Act of June 15, 1917), an affidavit filed as the basis for the issuance of a search warrant must state facts and not conclusions.

Atlantic Food Products Corp. v. McClure, 288 Fed. 982.

Lipschutz v. Davis, 288 Fed. 974.

U. S. v. Harnich, 289 Fed. 256.

In re Rosenwasser Bros., 254 Fed. 171.

In this case, the prohibition agent boldly swore that "one John Doe Foster, on one gas screw boat named 'Dragon,' on the 27th day of Sepember, 1922, and thereafter was, has been and is possessing, transporting intoxicating liquor, all for beverage purposes." (Trans. p. 65.) That was, of course, a mere conclusion and does not state the facts necessary to establish probable cause.

Giles v. United States, 284 Fed. 208.

United States v. Illig, 288 Fed. 939.

United States v. Yuck Kee, 281 Fed. 228.

(2) It did not sufficiently describe the article to be seized or the premises to be searched.

Section 3, Title XI, Act of June 15, 1917, known as the "Espionage Act," under which the search warrant was issued, provides the affidavit must par-

ticularly describe the property and place to be searched. (1918 Sup. Fed. St. Anno. p. 129.)

While the government did not produce the search warrant and no return was ever made thereon, the warrant could not exceed the affidavit on which it was based, which describes no liquors or premises.

Honeycutt v. United States, 277 Fed. 939.
Lipschutz v. Davis, 288 Fed. 974.

Point 2

The search warrant was illegally executed, because

(1) No copy was given the plaintiffs in error.

Section 12 of the "Espionage Act" requires a copy of the warrant be given the person from whom property is taken.

Agent Linville, who testified to having the search warrant, testified before the United States Commissioner at the preliminary hearing that he kept it in his pocket all of the time until long after the arrest and left it in the pilot house in the absence of the plaintiffs in error. (Trans. pp. 73-80.) At the trial he testified: "I did not show the search warrant to either of the defendants, I will admit that." (Trans. p. 131.)

His total failure to comply with the statute in the matter of the service of the warrant rendered it void.

United States v. Yuck Kee, 281 Fed. 228.

(2) No receipt for the property taken was given the plaintiffs in error.

It is admitted that no receipt was given to anybody of the property seized. (Trans. p. 78.) This was in violation of section 12 of the Espionage Act and rendered the execution of the warrant void.

United States v. Yuck Kee, 281 Fed. 228.

There was such a total disregard of all the provisions of the law as to search warrants, that the trial judge did not pass on these questions but rested his decision on the ground that the search was made pursuant to a valid arrest, which we shall now discuss.

Point 3

The search and seizure was not made pursuant to any valid arrest of the plaintiffs in error for an offense committed in the presence of the officers, for

(1) The evidence preponderated to establish that the liquor was inside the cabin of the launch hidden from view of the government agents.

The hearing on the motion to suppress was had on affidavits and this court is in as good a position to pass on the question of fact as to whether the sacks in which the liquor was contained could be seen, as was the trial court. It is admitted that the liquor was in the cabin of the launch "Dragon." The only dispute was as to whether the blinds were drawn or not. The defendants deposed that they were—and were corroborated in this by the three bystanders who witnessed the arrest. The agents deposed that on some of the windows the curtains were apart and they could see the forms of bottles in burlap sacks through those windows. It seems to us that the court would consider the extreme improbability that men engaged in the clandestine running of liquor, would carry their cargo exposed to view. The defendants are also corroborated by the testimony of agent Linville (the agent in charge of the raiding party), who testified before the commissioner on cross-examination, a few days after the arrest, "*after boarding the boat and finding it was loaded with liquor*, I didn't pay any attention to the search warrant then, until we tied up. I left the search warrant in the boat." (Trans. p. 73.) This statement made voluntarily before the controversy as to the validity of the search was raised and be-

fore there was the motive in the agents' minds to color their testimony, should, it seems to us, convince this court that the agents had nothing but suspicion as to what was in the boat prior to their high handed action in shooting one of the defendants and searching the boat afterward, and it was not until then that they knew or, as far as appears from the record, had any reasonable ground for believing that the defendants were violating any law.

In the case of a misdemeanor, an officer has no right to arrest without a warrant unless he has direct personal knowledge that the crime has been committed. This was held by the Supreme Court of the United States in the case of *Kurtz v. Moffitt*, 115 U. S. 487, 29 Law Ed. 458, where the court says:

"By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of a felony, and then only for the purpose of bringing the offender before a civil magistrate."

See also:

United States v. Snyder, 278 Fed. 650, at page 653.

United States v. Slusser, 270 Fed. 820.

State v. Gibbons, 118 Wash. 171.

State v. One Hudson Automobile, 190 N. Y. S. 481.

United States v. Myers, 287 Fed. 260.

(2) Assuming the agents could see gunny sacks with the outline of bottles therein, that was not proof to their senses that the bottles contained liquor.

Of course, the only crime which the agents could suspicion when they saw the "Dragon" coming up the river, was that the occupants were possessing and transporting liquor, which under the statute are mere misdemeanors. The fact that they could see the outline of bottles in gunny sacks, would only afford a ground of suspicion that the bottles contained intoxicating liquor. Mere suspicion that a citizen is committing a misdemeanor never justifies his arrest.

In the case of *Snyder v. United States*, 285 Fed. 1, decided by the Circuit Court of Appeals for the Fourth Circuit, last November, the facts were as follows:

The defendant, while standing on one of the public streets of Wheeling, W. Va., was approached by a federal prohibition officer, who, observing the in-

side pocket of his overcoat bulging out and the neck of a bottle protruding therefrom, walked up to him, placed one hand on his shoulder, remarked that he "had beat him to it," forcibly lifted the bottle half-way out of the pocket with the other, and finding it to contain a liquid of the appearance of whiskey, placed him under arrest, searched him and found three other bottles of whiskey on his person. In passing on his petition for suppression of the evidence, thus obtained, the court says:

"What we are therefore called on to determine is whether evidence of a misdemeanor obtained under the circumstances hereinabove enumerated is, where seasonable motion for its supprssion has been made, admissible at the trial.

"That an officer may not make an arrest for misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, containing intoxicating liquor then it would seem to follow without question that the arrest and search, without first having secured a warrant, were illegal. And that his only justifi-

cation was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty, or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whiskey, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful. . . . . .

"It follows from what has been said that the evidence of the misdemeanor charged in this case was illegally required; and this brings us to the question in the case, namely, whether evidence so illegally acquired should have been excluded in the trial subsequently had. . . . . .

"The federal courts have therefore adopted the policy of excluding evidence illegally obtained by a federal officer, whether the evidence so obtained was by an unlawful invasion of his home or of his person, on the ground that to hold otherwise would be to require him to supply evidence against himself. So fully have these questions been discussed in recent opinions of the supreme court that we regard anything more than a reference to the case as useless, as well as wholly out of place. Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177 Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled v. U. S., 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654."

We can not see how the court can distinguish between a case where the bottle was hidden by the cloth of an overcoat and where it was hidden by the burlap of a gunny sack.

In the recent case of *United States v. Myers*, 287 Fed. 260, where a prohibition agent observed what he thought were indications that the driver of an automobile was intoxicated, stopped and searched the automobile with a drawn pistol in his hand, and found liquor in the automobile, it was held that such search was illegal, under the Fifth Amendment to the United States Constitution, as compelling one to give evidence against himself; the mere supposition that the driver of the automobile was intoxicated not bringing the facts within the principle of the cases dealing with probable violations of law, such as where an officer sees liquor being loaded on an automobile, or plainly sees liquor leaking from a vehicle in which it is being transported.

In the case at bar as far as appears from the record, the agents had no positive information that the defendants were violating any law nor was there anything in their conduct that apprised them of any such fact.

In addition to the federal cases cited, we invite this court's attention to the following state cases, holding that the securing of evidence on the arrest and search of one for a misdemeanor without warrant and on suspicion is invalid and required the suppression of evidence so obtained.

Heaton v. Commonwealth, 243 S. W. 918.

People v. Forman, 188 N. W. 375.

Hughes v. State, 238 S. W. 588, 20 A. L. R. 639.

The trial court rested its decision overruling plaintiffs in error motion to suppress on two cases decided by this court. (Trans. p. 116.)

The case of *Vachina v. U. S.*, 283 Fed 35, and *Lambert v. U. S.*, 282 Fed. 413. The cases are clearly distinguishable. In the *Vachina* case, the officers seized a bottle and a demijohn of liquor, which were in plain sight on the floor in a public soft drink barroom. The crime was clearly being committed in their presence.

The *Lambert* case comes nearer sustaining the position of the trial court. In that case this court does not seem to have considered the distinction between the right of an officer to arrest in the case of a misdemeanor and a felony. He may only law-

fully arrest for a misdemeanor, when committed in his presence. He may arrest for a felony upon probable grounds for belief that it is being committed, *Kurtz v. Moffitt*, 115 U. S. 487, 29 Law. Ed. 458; *United States v. Snyder*, 285 Fed. p. 1. Assuming that Your Honors intended in the *Lambert* case to hold that the common law distinction between the right to arrest in the cases of misdemeanor and felonies has been abolished and that reasonable grounds for belief is sufficient in either case, yet the cases are distinguishable. In the *Lambert* case the officers could see a bottle of whiskey in the automobile and they had the testimony of an eye witness who saw it loaded into the car, and then they had the suspicious conduct of the defendant in seeking to sell the same in the cafes. In the case at bar, so far as the record shows, the agents had no direct or positive information as to the defendants being guilty of any crime nor was there anything in their conduct to "reasonably" lead the agents to believe that they were "actually engaged in a criminal act."

It follows that the evidence of the crime in this case having been illegally acquired, in that no valid search warrant was issued or executed or the search made pursuant to any valid arrest, that such evi-

dence should have been suppressed and there being no other or independent competent evidence of the guilt of the plaintiffs in error, the case should be reversed on this point and ordered dismissed.

ISSUE II

The Honorable Trial Court erred in overruling the demurrer to the indictment, because

Point 1

It is bad for duplicity, because

(1) It joins counts that are not for the same act or transaction or of the same class of crimes or offenses.

The first count charges that the plaintiffs in error and *others to the grand jurors unknown* with the crime of conspiring to violate the National Prohibition Act, which is a felony. The second, third and fourth counts charge the defendants individually with the misdemeanors of importing, possessing and transporting intoxicating liquors.

It will be noticed that the first count charges a crime committed by the defendants charged jointly with others to the grand jurors unknown. The three remaining counts are restricted to acts done by the

plaintiffs in error alone. They would not be provable by the same evidence. The last three counts could no doubt be properly joined in one indictment but the inclusion of the first count was fatal.

McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355.
Coco v. United States, 289 Fed. 33.
Brimie v. United States, 200 Fed. 726.
United States v. Connell, 285 Fed. 164.

This point was raised not only by demurrer but again at the opening of the trial by motion to elect and also again at the close of the trial when the motion to elect was renewed. (Trans. p. 160.)

ISSUE III

The Honorable District Court erred in refusing the plaintiffs in error the right to be tried by a fair and impartial jury, because

Point 1

It required the jury be examined *en masse.*

In impanelling the jury the court directed counsel for the defendants to address his general questions as to the qualifications of jurors to the jury

en masse and not to repeat the same to each individual juror, to which ruling exception was saved. (Trans. p. 120.)

It would seem to be fundamental that both the government and the defendant in a criminal case should be given the freest right to inquire on the *voir dire* examination as to the interest, direct or indirect, of the individual jurors that may affect their verdict. While it is undoubtedly the law that the trial court has a discretion in regulating the examination or even of taking it in his own hands, the arbitrary requiring that the questions be asked *en masse*, seems to be so great an abuse of discretion as to constitute reversible error.

Point 2

It denied the right to find if the verdict would represent the opinion of each individual juror.

Counsel for plaintiffs in error sought to ask the jurors this question: "If you were accepted on the jury, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did, except as they might influence you by legitimate argument? The fact that seven or eight or even more of the

other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?" The court denied the right to ask the question and exception was noted. Trans. p. 119.)

This ruling would seem to be error under the holding in *Allen v. United States*, 164 U. S. 492, 17 S. Ct. 154, 41 U. S. (L. Ed.) 528 at page 530.

ISSUE IV

The Honorable District Court erred in refusing plaintiffs in error the right to go into the legality of the arrest, search and seizure at the trial.

The petition for return and suppression of the evidence was tried on affidavits in advance of the trial and denied. At the trial counsel for defendants sought again on cross-examination of the federal agents to go into this question, which was by the court denied. (Trans. pp. 127, 128.)

Under exactly similar facts, in the recent case of *Gouled v. United States*, 298 U. S. 313, 65 L. Ed. 647, at page 654, the Supreme Court of the United States said:

"In the case we are considering, the certificate shows that a motion to return the papers, seized

under the search warrants, was made before the trial and denied; and that, on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

ISSUE V

The Honorable District Court erred in submitting the conspiracy count to the jury, because

Point 1

There was no proof of the only overt act alleged to-wit, the importation of the liquor.

An examination of the indictment shows that the material part of the only overt act alleged in Count 1 (the conspiracy count) is as follows:

". . . . In order to effect the object of said conspiracy, the said conspirators, Joseph Fredericks, alias Joseph Watson, and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia in the Dominion of Canada, on or about the 4th day of October, 1922, did . . . . . carry and

transport in and on a certain gas boat known as the 'Dragon' to a place near Stanwood, Washington . . . . . certain intoxicating liquors. . . . ." (Trans. pp. 3, 4.)

This is clearly a charge of importation. There is no magic in words. To say that one unlawfully carried liquor from Vancouver, B. C., to Seattle, would be equivalent to saying that he had unlawfully imported it.

While the rule of variance between pleading and proof is technical, it is a doctrine necessary to the protection of the rights of the accused.

Guilbeau v. United States, 288 Fed. 731.

Proof of transportation is not proof of importation.

The motions for directed verdict made on behalf of each of the defendants, both at the end of the government's case (Trans. p. 144) and the conclusion of all the evidence (Trans. pp. 159-162), raised the question here discussed. The only overt act alleged was the act of importation from Canada. The court held that as to Count II, the charge of importation, that proof of the *corpus delicti* by evidence *aliunde* was necessary and that an extra judicial confession by the accused would not take the matter of importation to the jury. (Trans. p. 162.)

The holding of the court was correct on the following authorities:

Goff v. U. S., 257 Fed. 294.
Martin v. U. S., 264 Fed. 950.
Gordnier v. U. S., 261 Fed. 910.
Naftzger v. U. S., 200 Fed. 494.
U. S. v. Mayfield, 59 Fed. 118.
U. S. v. Boese, 46 Fed. 917.
Wharton's Criminal Law, Vol. 1, Sec. 360, p. 455.

We can not understand how the court could withdraw Count II from the consideration of the jury and direct a verdict of not guilty without doing the same as to Count I because the substantive charge of importation was the only overt act alleged in Count I, the overt act being an essential ingredient of the offense and it being the law that it must be proved as laid. There can be no escape from the conclusion that Count II should have been withdrawn from the consideration of the jury.

While this was true as to both counts *a fortiori* it should have been granted as to the defendant Fredericks because the only evidence (which was not sufficient, there being no independent proof of the *corpus delicti*, to prove the importation) was the alleged extra judicial confession of Chambers made

twenty-four hours after the arrest and not in the presence of Fredericks and, therefore, not binding on Fredericks. It must, therefore, be apparent to the court that the motion for a directed verdict of not guilty, should be granted as to Count I as well as Count II.

ISSUE VI

The Honorable Trial Court erred in its instructions given and refused on the charge of conspiracy, because

Point 1

The instructions did not correctly define the law of conspiracy, because

(1) They failed to tell the jury that before one could be convicted of a conspiracy, it must be established that he acted pursuant to a mutual agreement.

The defendants requested the following instruction:

"Even though the evidence should convince you that each of the defendants acts illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done

pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I." (Trans. p. 175.)

The foregoing requested instruction is a correct statement of the law and should have been given. As pointed out by Judge Rudkin in the recent case of *Simpson v. United States*, 289 Fed. 188, a conspiracy to commit a crime does not necessarily exist whenever two or more persons are in anywise implicated in its commission.

Lucadamo v. U. S., 280 Fed. 653.
U. S. v. Johnson, 26 Fed. 682.
Rex. v. Pywell, 1 Stark. 402.
Newall v. Junkins, 26 Pa. 159.
Fed. Crim. Law, Zoline, Sec. 1029.
U. S. v. Vannatta, 278 Fed. 559.

Point 2

It deprived the plaintiffs in error of the benefits of their defense.

Assuming this court should hold that the extrajudicial statement of Chambers, made after the arrest and in the absence of Fredericks, that the liquor was secured at Pender Island was competent to carry to the jury the overt act charged in the con-

spiracy, i. e., the importation, nevertheless the plaintiffs in error had the right to have that disputed question of fact passed on by the jury under proper instructions. It is, of course, reversible error where the instructions do not present the theory of defendants' case, where the same is supported by evidence.

Calderon v. United States, 279 Fed. 556.

The theory of the defense on the conspiracy count was that the charge made in the only overt act alleged, the importation from Canada was false and the evidence of the defense, if believed, established it.

The following instruction given by the court and excepted to at the time in the presence of the jury is clearly erroneous and prejudicial:

"In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the conduct of the parties that so inter-relate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial

what that act is. It might be sailing a boat down the stream, or it might be carrying cargo or the prohibited commodity in a boat. *It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy.*" (Trans. p. 164.)

"The court withdrew,—as I stated a moment ago briefly—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the national prohibition act, to import liquor from British Columbia, and one of the persons then does anything to effect that object,—this is simply for the purpose of illustration,—if he writes a letter to carry it forward, or if he runs a boat around the bay, if he does anything,—*it is immaterial what it is,—to effect the object of the conspiracy, why then the offense is complete without bringing in any of the liquor.* But to import any liquor into the United States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that was made before you by counsel for the defendants." (Trans. p. 166.)

The court was requested and refused to give the following:

"If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in the said First Count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the 'Dragon' to a place near Stanwood, Washington, the intoxicating liquors described in said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the national prohibition act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged can not be found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I. (Trans. p. 174.)

"I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat 'Dragon' near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of law, yet you could not convict either one of

these defendants upon either the first or second counts in this indictment, because to convict the defendants on said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia." (Trans. p. 175.)

To the refusal of the court to give the requested instructions, the defendants saved their exceptions in the presence of the jury.

The giving of the above instructions and the refusal of the court to give the instructions requested by the defendants, and also the overruling of defendants' motion for a directed verdict, raises as the ultimate issue on this point the question: *Where a count for conspiracy in an indictment alleges but one overt act, can the government sustain a conviction upon the proof of other acts not charged in the indictment or must it prove the only overt act alleged as laid?*

It has been held so repeatedly under section 37 of the Penal Code of the United States that an overt act must be charged and proved as an essential ingredient of the crime of conspiracy that no citation of authority is necessary. It is equally well settled by the federal decisions that in a prosecution of conspiracy where there are a number of overt acts

alleged in the indictment, all need not be proven to sustain a conviction provided that one is.

Tacon v. United States, 270 Fed. 88.

It is equally elementary that an overt act, being an essential ingredient of the crime, that where the government elects to rely upon one specific overt act, it is held to the proof of that overt act as charged.

The trial court so stated the law in the recent case of *United States v. Ault*, 263 Fed. 800: "Overt acts must be proved as laid in the indictment. U. S. v. Newton, B. C., 52 Fed. 275 at p. 285." A reading of the case cited by His Honor in that case (the Newton case) discloses that the defendants were there charged with a scheme to defraud the United States by mailing a large number of old newspapers for the purpose of fraudulently increasing the weight of mail (transported over a railway post route during a period fixed by the postal authorities for weighing such mail matter, as a basis for ascertaining the satisfactory compensation to be paid the railway company). As an overt act, it was alleged that the newspapers were mailed between certain towns and at the trial evidence was permitted to be introduced in reference to certain alleged remailing from a different town than that alleged in the overt act. The court told the jury:

"That evidence can not be taken as proving the overt act or act performed to carry out the object of the conspiracy, as stated in the second point submitted in these instructions. *Such overt act must be proved as laid in the indictment;* that is that within this district there was mailed from Des Moines, during said weighing period, over said post route, the mail matter described and as described in the indictment; *and unless such overt act is proven as it is laid in the indictment* and as I have stated it to you, the crime charged can not be found by you to be proven."

The learned editors of Corpus Juris, in volume 12, page 626, state the law as follows:

"As in other criminal prosecutions, on the trial of an indictment for conspiracy the proof must carry out and support its material averment and if the offense intended is stated with unnecessary particularity, it should be proved as laid. On the other hand, immaterial variance is not fatal to conviction.

"The purpose or object of the conspiracy must be proved as laid in the indictment.

"Likewise the means to be employed in effecting the object of the conspiracy and *overt acts in execution thereof must be proved as charged.* However, if several overt acts are charged it is not necessary to prove them all."

Under the evidence introduced at the trial, no doubt had there been different overt acts charged

in the indictment, there would have been evidence upon which a verdict of conviction on the conspiracy count, which could have been sustained. The district attorney could have charged that the defendants, as an overt act, brought the boat "Dragon" into the mouth of the Stillaguamish River. However, he did not see fit to do so but elected to rely upon the specific charge that the defendants did on the 4th day of October bring in liquor on the boat "Dragon" from a foreign country, to-wit, Canada. The overt act is clear and specific and the government, having relied upon that one overt act as the sole overt act, is restricted to the proof of that act as laid.

The case of *Rabens v. United States*, 146 Fed. 978, was a case in which the defendants were indicted for a conspiracy to rob a postoffice at Latta, South Carolina. The evidence tended to show the conspiracy was one to rob banks and businesses generally. The Circuit Court of Appeals of the Fourth Circuit in deciding the case says:

"The count upon which the plaintiff in error was indicted is clear and specific, and leaves no doubt as to the offense charged, to-wit, a conspiracy to rob the postoffice at Latta. There is no allegation in the count which can in any way be construed to

mean a general conspiracy to rob. The district attorney could undoubtedly have charged a general conspiracy to rob. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the postoffice at Latta. Therefore evidence tending to show a general conspiracy was incompetent and should have been rejected by the court. The government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the postoffice at Latta, as alleged. The case of Commonwealth v. Harley and another, 7 Metc. (Mass.) 506, is on all fours with the case at bar. In that case it was held that the averment in an indictment for conspiracy charging defendants with a conspiracy to defraud A, was not supported by proof that they conspired to defraud the public generally or individuals whom they might meet and be able to defraud.

"A careful inspection of the record leads us to the conclusion that the introduction of evidence by the government tending to show a general conspiracy without showing that the defendant had knowledge that the robbery of the postoffice at Latta was contemplated by the conspirators was prejudicial to the plaintiff in error, and no doubt resulted in his conviction on all the counts; and, whereas, there is no evidence to justify a conviction of the plaintiff in error on the other counts, we are of opinion that the plaintiff in error is entitled to a new trial. The judgment of the Circuit Court is therefore reversed,

and the cause remanded, with directions to grant a new trial."

To the further effect that an overt act alleged in the indictment must be proved, see *United States v. Johnson*, 26 Fed. 682; *Ecock v. State*, 82 N. E. 1039; *Com. v. Ellis*, 118 S. W. 973.

It is, of course, elementary that one of the purposes of an indictment is to advise the court of the charge and to advise the defendant of what he must meet as otherwise a defendant might be entrapped if it were permissible to charge him with the commission of a crime in one manner and permit it to be proved in another.

In the case of *Naftzger v. United States*, 200 Fed. 494, the defendant was indicted for receiving and converting to his use United States postage stamps. The indictment alleged that the stamps had been stolen from the United States at certain postoffices of the United States in the State of Kansas. It was entirely unnecessary to have alleged that the stamps were stolen from "certain postoffices in the State of Kansas" and the government was unable to prove at the trial that the stamps had actually been stolen in the State of Kansas, and had this not been alleged in the indictment, it would not have been necessary to have proved it.

The Circuit Court of Appeals of the Eighth Circuit, page 496, uses the following language:

"Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain postoffices in the State of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but, having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of the grand jury only—a coordinate branch of the court. It is for that body, and for no other officer, to say what shall and what shall not be charged, because the fifth amendment to the Constitution declares that:

" 'No person shall be held to answer . . . . for an infamous crime, unless on a presentment or indictment of a grand jury.'

"In effect the government now insists on amending the indictment by striking out the words 'from various postoffices in the State of Kansas.' That was what was in fact done in the case of Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, a case against a national bank officer for falsifying the books with intent to deceive the United States, depositors and others, 'and the Comptroller of the Currency.' The words 'Comptroller of the Currency' need not have been alleged. Those words on motion of the United States attorney were stricken

out by the court as surplusage. After conviction the Supreme Court, in habeas corpus proceedings, held the judgment to be void. It was conceded that there was no necessity to allege that the comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from whereso-ever stolen from the government. But it is alleged that the stamps were stolen within the State of Kansas.

"An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner. In Iowa, for keeping a gambling house, an indictment is sufficient which charges the building to have been within the county. But in State v. Crogan, 8 Iowa 523, the allegation was that the building was on a certain lot within the county. The evidence showed that the building was on a lot other than as charged. Held, that a verdict of acquittal should have been directed; the opinion reciting:

" 'In this case it was not necessary for the pleader to have stated the location of the house kept, further than to show the proper venue. Having alleged, as a matter of local description, that it was upon a particular lot, the proof should have sustained the allegation. The instruction should have been given.' Citing section 281, Wharton's Criminal Law, and other authorities."

So in this case under the trial court's instructions, while the defendants were charged with having transported this liquor from Canada to near the town of Stanwood, under the court's instructions the jury were permitted to find the defendants guilty without proof of this fact and on the proof that the defendants were seen on the boat in the vicinity of La Conner. This violates every principle of criminal law.

It was pointed out by the Supreme Court of the United States in the case of *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 Law Ed. 849, that when an indictment is filed with the court, no change can be made in the body of the instrument either by order of the court or by the United States attorney without a resubmission of the case to the grand jury and the fact that the court may deem a change immaterial, as striking out surplus words, makes no difference, that the instrument is the work of the grand jury which presented it and the charges therein contained must be proved as charged by the grand jury, and that a conviction on a trial and presentation of facts other than in accordance with the charge as made by the grand jury in the indictment, is void.

Where an indictment sets forth unnecessary matter of description or avers the commission of an offense in a certain manner, although such allegation was not necessary, it must be proved as laid.

U. S. v. Porter, Fed. Cases 16074.

U. S. v. Keen, Fed. Cases 15510, 1 McClain 429.

U. S. v. Brown, Fed. Cases No. 14666, 3 McClain 233.

Schroeder v. State, 241 S. W. 169.

State v. Herrera, 207 Pac. 1085.

Arbetter v. State, 186 S. W. 769.

White v. State, 198 S. W. 964.

State v. Potter, 186 N. W. 919.

Lowell v. People, 82 N. E. 226.

State v. Vetrano, 117 A. 460.

It can not, of course, be disputed that although the evidence on a trial might show a defendant guilty of some other crime, he can only be convicted of the crime with which he is charged. In the case of *Einziger v. United States*, 276 Fed. 905, defendants were charged with having conspired to sell intoxicating liquors. The overt acts as laid in the indictment were that one of the defendants endeavored to deliver liquors to one Brown, whom the defendants thought was a person desiring to buy liquor

but who in fact was a prohibition agent engaged in detective work. Second, that in attempting to deliver the liquors, the defendants transported them through the streets of Trenton to a certain garage. The government introduced evidence from which the jury might find the conspiracy to transport but no evidence from which it could be inferred that the defendants were conspiring to sell. The defendants moved for a directed verdict which the trial court denied. The Circuit Court of Appeals at page 907, says:

"That the defendants when caught were violating some provision of the Volstead Act (41 Stat. 305) is quite clear. But whether they had conspired to violate the provision of the act forbidding the sale of intoxicating liquors for beverage purposes—judged alone from what they were doing with the liquors when caught—is not so clear. *Conspiring to sell liquor was the sole offense with which they were charged. It was, therefore, the only offense of which, under the indictment, they could be convicted.* To sustain the verdict that the defendants were guilty of the crime of conspiring unlawfully to sell intoxicating liquors, there must of course have been evidence of a sale, contemplated, in progress or completed. Obviously this is true, for if the defendants when caught were merely transporting liquor for themselves or for others, or were doing anything with it other than carrying out a conspiracy for its sale, they were, however guilty

of other offenses—not guilty of the one for which they were being tried.

"In all human likelihood a sale was involved somewhere in the transaction. Yet a lawful conviction for conspiracy to effect such a sale can not be had except on evidence. No evidence of a sale is disclosed in the record. The nearest approach to it was the statement made by the witness Brown that Einziger's purpose in seeking the secretary was to receive from him pay for the liquor. It may have been. Yet this was only Brown's conclusion of Einziger's purpose and was nothing more than an inference from testimony which was equally capable of raising an inference that the defendants were merely transporting liquor. Evidence of a sale can not be gathered from the fact of transportation alone."

The foregoing is very analagous to the situation here. While in the indictment in the case at bar, the defendants are charged with the conspiracy to import, possess and transport, the only overt act alleged in the indictment is that of importation. There is evidence of an overt act of transportation but that is not the overt act charged by the government and so as was said in the *Einziger* case *supra*, "that the defendants when caught were violating some provisions of the Volstead Act is quite clear" but that they imported the liquor, which was the sole overt act with which they were charged in the in-

dictment, was not proven and as that was one of the essential elements of the crime charged in the indictment, therefore, there was no evidence upon which their conviction upon the conspiracy count could be sustained. If the grand jury had charged that the overt act consisted either of the possession or transportation of the liquor at the mouth of the Stillaguamish River, then possibly the conviction could be upheld. Obviously no matter how guilty the defendants may be of conspiracy or any other offense, they are not guilty of the one with which they were charged in the indictment.

Point 3

The instructions were misleading in that they told the jury they could find the plaintiffs in error guilty on overt acts not alleged in the indictment.

The *Einziger* case above referred to illustrates a further error in the case at bar which runs through the charge of the Honorable District Court to the jury. In the *Einziger* case, the court says:

"Aside from error in submitting the case on evidence which we think does not sustain the verdict, we find a vein of error running through the charge. In the beginning the learned trial judge directed the attention of the jury to the crime charged by

the indictment, namely, conspiracy to sell liquor in violation of a law of the United States, and correctly instructed them on the law. But thereafter, in elaborating the law of conspiracy, the learned trial judge drifted—quite unconsciously—from the offense particularly charged by the indictment and extended his remarks to a conspiracy to violate the Volstead Act generally, conveying to the jury, we are constrained to believe, the idea that if they found the defendants had violated the Volstead Act in any of its provisions they should return a verdict of guilty. It was, of course, obvious to the jury that the defendants when arrested were violating some provision of the Volstead Act and it was inevitable that they would, under these general instructions repeatedly made and differently phrased, return a verdict of guilty; but whether the jury would have returned such a verdict if the court's instruction had been addressed and limited to a conspiracy to violate that part of the Volstead Act which forbids the sale of liquor, no one can say.

"Rules of law, whether pertaining to evidence or to the charge of the court in a case arising under the Volstead Act, differ in no respect from like rules applicable in other cases.

"We are constrained to find prejudicial error in the trial and to hold, in consequence, that the judgment below must be reversed and a new trial awarded."

So when we examine carefully the charge given in this case, we will see that while as abstract propo-

sitions the trial court's references to the law of conspiracy are no doubt correct, but that in elaborating upon the law of conspiracy he drifted, no doubt quite as unconsciously as did Judge Bodine, the trial judge in the *Einziger* case, away from the offense particularly charged by the indictment and extended his remarks to a conspiracy to violate the Volstead Act generally. His Honor told the jury correctly enough that they must find that the defendants entered a conspiracy to do the particular thing charged, then he went on to say:

"And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down stream, or it might be carrying the cargo or the prohibited commodity in a boat. *It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy.*" (Trans. pp. 164-165.)

From the foregoing language the jury were clearly lead to believe that irrespective of the fact that the indictment charged as the only overt act that

the defendants had imported the liquor from Canada, they could entirely disregard this charge in the indictment and if they found that the defendants had done any other acts, not charged in the indictment, to violate the Volstead Act in any of its provisions, they should return a verdict of guilty. Under the doctrine of the *Einziger* case, this was clearly prejudicial error.

The Honorable District Court in passing on the motion of the plaintiffs in error for a new trial inferentially admitted that, if our construction of the overt act alleged in the conspiracy count was correct, the correctness of our contention would follow, but placed his decision on the ground that the use of the words "from British Columbia" in describing the overt act was a mere recital that could be disregarded. (Trans. p. 177.) We know of no rule of law or grammar that permits of such conclusion, nor was any cited either by the government or the court. Certainly a man's liberty does not hang on some obscure construction of a plain averment. The plaintiffs in error were brought into court to meet the issue that they had unlawfully imported this liquor from Canada. They came prepared to meet that issue and that issue only. No competent evidence was presented against them on

that issue and they were convicted on evidence of overt acts not alleged.

It would certainly be unfair to charge one with bringing liquor from Olympia to Seattle and then permit him to be convicted on evidence that he brought it from Vancouver to Stanwood. Unless this court is prepared to hold that a defendant in a conspiracy case, can be convicted on overt acts not alleged, this case must be reversed, for in view of the erroneous and prejudical instructions, the jury could not do otherwise than convict.

We submit that it clearly appears that error was committed in the following material matters to the prejudice of plaintiffs in error:

(1) The evidence upon which they were convicted, was obtained by a most outrageous violation of their constitutional rights. This necessitates the reversal of the judgment and dismissal of the action.

(2) The indictment was duplicitous and contained improper joinder of counts. This necessitates the dismissal of the action.

(3) Their rights to an impartial jury were denied. This necessitates the granting of a new trial.

(4) Their right to show the invalidity of their arrest and search was denied at the trial. This necessitates the granting of a new trial.

(5) There was a fatal variance between the overt act charged in the conspiracy count and the proof, entitling them to a dismissal on that count. This necessitates reversal of the judgment as to this count and dismissal thereof.

(6) The instructions of the court were erroneous and prejudicial on the law of conspiracy. This necessitates the granting of a new trial.

From each and all of these standpoints, the conviction of the plaintiffs in error was wrong. Being contrary to principle and precedent, we submit the judgment should be reversed, with instructions to dismiss the action, or in any event the granting of a new trial.

Respectfully submitted,

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